No. 20-50448

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TONY K. MCDONALD; JOSHUA B. HAMMER; MARK S. PULLIAM,
Plaintiffs-Appellants,

v.

JOE K. LONGLEY, IMMEDIATE PAST PRESIDENT OF THE STATE BAR OF TEXAS; RANDALL O. SORRELS, PRESIDENT OF THE STATE BAR OF TEXAS; LAURA GIBSON, MEMBER OF THE STATE BAR BOARD OF DIRECTORS AND CHAIR OF THE BOARD; JERRY C. ALEXANDER, MEMBER OF THE STATE BAR BOARD OF DIRECTORS; ALISON W. COLVIN, MEMBER OF THE STATE BAR BOARD OF DIRECTORS; ET AL.
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, No. 1:19-cv-219 (Yeakel, J.)

OPENING BRIEF FOR APPELLANTS

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June 30, 2020

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CERTIFICATE OF INTERESTED PERSONS

(1) No. 20-50448, *McDonald v. Sorrels*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court can evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful because this appeal presents important and novel questions about the scope of First Amendment protections for attorneys who are forced to join "integrated" state bar associations in order to engage in their chosen profession. This appeal addresses multiple questions left open in *Keller v. State Bar of California*, 496 U.S. 1 (1990), about the extent to which attorneys can be coerced to join and fund a bar association that engages in extensive political and ideological activities.

The issues presented in this appeal overlap substantially with those in *Boudreaux v. Louisiana State Bar Ass'n*, No. 20-30086. On June 11, 2020, this Court granted Appellants' motion to expedite this appeal and hold oral argument on the same day as *Boudreaux*.

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JURISDICTION

The district court had jurisdiction because Appellants allege violations of the First and Fourteenth Amendments. 28 U.S.C. §§1331; 1343. This Court has jurisdiction under 28 U.S.C. §1291 because this appeal arises from a final judgment in favor of Appellees. The district court entered final judgment on May 29, 2020, and Appellants filed a timely notice of appeal on June 2, 2020.

STATEMENT OF ISSUES

This case presents several important questions left open by the Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990):

I. Does the First Amendment prohibit a state from compelling attorneys to join and associate with a state bar association that engages in pervasive political and ideological activities?

II. Even if attorneys can be compelled to join a state bar association, does the First Amendment prohibit a state from compelling members to fund political and ideological activities that extend beyond regulatory and disciplinary functions?

III. What procedures must a state bar association follow to ensure that a member's coerced dues are not used to fund political and ideological activities to which the member objects?

STATEMENT OF THE CASE

I. Overview of "Integrated" and Voluntary Bar Associations.

An "integrated" bar association (also called a "unified" or "mandatory" bar) is "an official state organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction." *The Integrated Bar Ass'n*, 30 Fordham L. Rev. 477, 477 (1962). These associations are described as "integrated" because they both regulate the legal profession and engage in other activities such as lobbying, promoting "access to justice" and pro bono work, organizing conferences and continuing legal education programs, holding public forums, publishing reports, and promoting diversity initiatives.

An integrated bar association differs from a voluntary bar association in that it is an "official organization by authority of the state" and has "compulsory membership." *Id.*; *see also Jarchow v. State Bar of Wisc.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J. dissenting from denial of cert.) ("Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State."). The Supreme Court has recognized that integrated bars can burden the First Amendment rights of those who are compelled to join in a manner "substantial[ly]

analog[ous]" to the way in which mandatory "agency shop" arrangements can burden the rights of union members. *Keller*, 496 U.S. at 12.

Although a majority of states currently have integrated bar associations, they are by no means necessary to ensure adequate regulation and supervision of the legal profession. Nearly twenty states—including large legal markets such as New York, Illinois, Massachusetts, Ohio, and Pennsylvania—regulate the legal profession directly without a compulsory, integrated bar. *See In re Petition for a Rule Change to Create a Voluntary State Bar*, 841 N.W.2d 167, 171 (Neb. 2013). Voluntary bar associations devoted to improvement of the law and the legal profession have continued to flourish in those jurisdictions even in the absence of government coercion. For example, the New York State Bar Association—which is supported solely by voluntary membership and contributions—has over 70,000 members, more than 125 employees, and more than $20 million in annual revenue. *See* About NYSBA, History and Structure of the Ass'n, bit.ly/2sGoDtW; Report to Membership 2017-18, The Year In Review, bit.ly/36aqDbM.

II. Texas Law Requires All Attorneys to Join and Fund the Bar as a Condition of Practicing Their Chosen Profession.

The State Bar of Texas is an "integrated" bar association. The Bar is a public corporation and an administrative agency of the judicial department, operating under the administrative control of the Supreme Court of Texas. *See* Tex. Gov't Code § 81.011. Individuals who wish to practice law in Texas are compelled to join the Bar in order to engage in their profession. *See* Tex. Gov't Code § 81.051(b) ("Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court.").

Failure to join the Bar makes an individual ineligible to practice law in Texas. An attorney who is eligible to practice law in Texas but is not currently practicing may move to "inactive" status. *See* Tex. Gov't Code §§ 81.052, 81.053. Inactive members must remain members of the Bar, and continue to pay dues, in order to preserve their eligibility to return to active status in the future.

All attorneys licensed to practice law in Texas must pay dues to the Bar. *See* Tex. Gov't Code § 81.054. Those dues are currently $68 for attorneys licensed 0 to 3 years, $148 for attorneys licensed 4 to 5 years,

and $235 for attorneys licensed more than 5 years. ROA.3749. Dues for inactive members are currently $50 per year. ROA.3761. In the year ending on May 31, 2017, the Bar collected more than $22 million in mandatory dues, plus another $25 million in revenue from its other activities. ROA.3775.

Texas law also imposes an additional $65 "legal services fee" on certain attorneys as a condition of their practicing law. Tex. Gov't Code § 81.054(j). This fee is imposed only on certain attorneys in active private practice in Texas. It is not imposed on attorneys over 70 years old or on inactive status; those who work in state, federal, or local government; those who work for certain non-profit organizations; and those who reside out of state and do not practice law in Texas. *Id.* § 81.054(k).

III. The Bar's Use of Compelled Dues for Ideological and Political Activities.

Under Supreme Court precedent, compelled bar dues can be used only for carefully limited purposes such as "proposing ethical codes and disciplining bar members." *Harris v. Quinn*, 573 U.S. 616, 655 (2014). But the Bar does not limit its spending to this narrow category. Instead, it uses coerced dues for extensive political and ideological activities that extend far beyond any regulatory functions.

Legislative Program. It is difficult to imagine a more quintessentially "political" activity than advocating for the passage of legislation. Yet the Bar uses compelled dues to do just that. The Bar maintains a Governmental Relations department that "serves as the State Bar's liaison to the Texas Legislature and other state and federal governmental entities." ROA.3752. This department "reviews thousands of bills each legislative session for their potential impact on the State Bar and the legal profession," and "manages and coordinates" the Bar's legislative advocacy for certain bills. *Id.* The Bar's 2019 legislative program included proposed legislation on wide-ranging matters including construction law, family law, LGBT law, poverty law, real estate law, trust law, and probate law. ROA.3755-57.

The Bar is currently advocating for the passage of forty-seven proposed bills in these areas. *Id.* One of these bills (SJR 9) would amend the definition of marriage in the Texas Constitution. ROA.3756, 3959. Another (HB 978) would amend the Texas Code to create civil unions, "intended as an alternative to marriage" for both sexes. ROA.3756, 3961-79. Other bills would modify the procedures used by grandparents to gain access to grandchildren over parental objections (HB 575), ROA.3755,

3981-83; substantively amend Texas trust law (HB 2782), ROA.3756, 3985-4017; and impose notification requirements on parents wishing to take summer weekend possession of a child under a court order (HB 553), ROA.3755, 4019. The Bar also publishes a weekly newsletter during the legislative session, called the *Friday Update*, which is "intended to keep members up to date on legislation of interest to the legal profession." ROA.3752.

Diversity Initiatives. The Bar has an "Office of Minority Affairs." The goals of this office include "serv[ing] minority, women, and LGBT attorneys and legal organizations in Texas" and "enhanc[ing] employment and economic opportunities for minority, women, and LGBT attorneys in the legal profession." ROA.3841. The Office of Minority Affairs engages in "Minority Initiatives," which are "ongoing forums, projects, programs, and publications dedicated to [their] diversity efforts." *Id.* These initiatives include the Texas Minority Counsel Program, Texas Minority Attorney Program, Minority Attorneys at the Podium Project, Diversity Forum, Diversity Summit, LeadershipSBOT, Pipeline Program, Texas Spectrum (a diversity newsletter), and the Ten Minute Mentor Program. ROA.3841-42.

All of the Bar's "diversity" initiatives are premised on the assumption that is appropriate to offer certain services targeted at individuals of a particular race, gender, or sexual orientation. The Texas Minority Counsel Program, for example, is a "client development, networking, and CLE event for diverse attorneys in Texas," which are defined as "minority, women, and LGBT attorneys." ROA.3845. This annual program allows "diverse lawyers" to "meet one-on-one to discuss potential outside counsel opportunities," and offers "incomparable networking events." ROA.3853. The Bar also operates a host of diversity committees and sections. ROA.3849-50.

Access to Justice Division and Programs. The Bar maintains a "Legal Access Division" that "offers support, training, publications, resource materials, and more to legal services programs and pro bono volunteers." ROA.3874. During the 2018-2019 budgetary year, the Bar spent over $1 million on Legal Access Division programs. ROA.3871. In 2019-2020, the Bar plans to spend over $1.5 million on these activities. ROA.3867.

The Bar spent an additional $827,000 in 2018-2019 funding an "Access to Justice Commission," and it intends to spend a similar amount

during the 2019-2020 fiscal year. *See* ROA.3871, 3867. The Access to Justice Commission engages in a variety of highly political and ideological activities, including lobbying. *See* ROA.3942-45. The Commission's lobbying is aimed at "increas[ing] resources and funding for access to justice," ROA.1607, and promoting "systemic change," ROA.1619. Simply put, Appellants' coerced dues are used to finance an organization that lobbies to increase government spending on its preferred programs and policies.

In connection with its pro bono and "access to justice efforts," ROA.3607, the Bar maintains a directory of "volunteer and resource opportunities." ROA.3887-88. That directory "provides a comprehensive list of training, volunteer, and donation opportunities for attorneys who would like to assist with migrant asylum and family separation cases." *Id.* Every one of the relevant entries promotes a group that seeks to assist undocumented immigrants in remaining in the United States. *Id.* Moreover, the directory links to a June 28, 2018 article published by Defendant Joe K. Longley, President of the Bar. In that article, Longley says he "traveled to the border to learn how we can promote access to justice and the rule of law related to the separation of immigrant

families" and decided to create the volunteer opportunities webpage as a result. ROA.3890-91. Even though Longley was expressly encouraging Bar members to oppose immigration policies being implemented by the federal government, Longley claimed that "[t]his is not about politics. It's about access to justice." *Id.*

Legal Services Fee. As noted above, Texas law requires certain attorneys to pay a $65 legal services fee. Tex. Gov't Code § 81.054(j). This fee is imposed only on a subset of attorneys in active private practice in Texas. The $65 legal services fee has nothing to do with regulating the profession or ensuring ethical conduct by attorneys. Its *sole* purpose is to fund legal services for certain groups. Half of the fees are allocated to the Supreme Court Judicial Fund, which provides civil legal services to the poor, and the other half goes to the Fair Defense Account of the State's general reserve fund for indigent criminal defense. *See id.* § 81.054(c). This fee is effectively a compelled charitable contribution that is imposed on certain Texas attorneys as a condition of practicing their chosen profession.

Other Non-Chargeable Activities. The Bar spends attorneys' compelled dues on countless other activities that extend far beyond the

regulation of attorneys. The Bar hosts an annual Convention at which political and ideological activities are rampant. During the 2018 Convention, for example, topics included "Diversity and Inclusion: The Important Role of Allies"; "Current Issues Affecting the Hispanic Community"; "LGBT Pathways to the Judiciary: Impact of Openly LGBT Judges in Texas"; "Implicit Bias"; "Texas Transgender Attorneys: A View from the Bar"; and a "Legislative Update [on] Proposed Rulemaking Under the Trump Administration." ROA.3904-28.

The Bar also funds ideologically charged Continuing Legal Education programs. *See, e.g.*, ROA.3879-82 ("The Paradox of Bodily Autonomy: Sex Confirming Surgeries and Circumcision"; "Intersectionality: The New Legal Imperative"). It spends nearly $800,000 on advertising each year. *See* ROA.3870. It publishes and exercises editorial control over its "official publication," ROA.3947, the *Texas Bar Journal*, on which it spends over $1.5 million each year. ROA.3871. And to support these activities, the Bar spends millions on administrative staff, technology, and facilities. *See* ROA.3866-72.

IV. The Bar's Inadequate Opt-Out Procedures.

To the extent a bar association engages in political or ideological activities—as the Bar plainly does, *see supra*—it must implement

appropriate procedures to ensure that individuals are not compelled to support and associate with activities to which they object. Supreme Court precedent mandates the use of procedures by which members must *opt in* before their compelled funds are used to subsidize political and ideological activities, rather than *opt out* of having their funds used for these purposes. *See Knox v. Servs. Emps. Int'l Union, Local 100*, 567 U.S. 298, 321-22 (2012). Yet the President of the Bar recently admitted that the Bar "has had an 'opt out' refund procedure for decades." ROA.3950.

The Bar's opt-out procedures are convoluted and burdensome. If an individual wants to opt out of paying for political and ideological activities, he must first pay his dues in full. He can then "object" and "seek a refund of a *pro rata* portion of his or her dues expended." ROA.3957, 4099. The executive director of the Bar (in consultation with the Bar's President) has the sole "discretion" to issue refunds. *Id.* If the executive director declines to do so, the objector is out of luck. Refunds are given only for "the convenience of the Bar," not because "the challenged activity was or would not have been within the purposes of or limitations on the State Bar." *Id.* Thus, even if a member shows that

certain political or ideological expenditures are non-chargeable, the Bar continues charging all members *except the single objector*.

Moreover, the Bar provides nothing resembling a *Hudson* notice, whereby members can see which portions of the dues are paying for regulatory functions and which portions are paying for non-chargeable political and ideological activities. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). This puts the entire burden of identifying non-chargeable expenses on potential objectors. And, in an apparent effort to minimize the use of even its inadequate opt-out procedures, the Bar's main dues webpages failed to mention the opt-out procedures at all at the time this suit was filed. *See* ROA.3749-50, 3952-55. They instead stated that "[a]ll Texas lawyers *must* pay" the enumerated dues or face suspension. ROA.3749 (emphasis added).

V. Proceedings Below.

A. Appellants Tony McDonald and Joshua Hammer are attorneys licensed to practice law in Texas and active members of the State Bar of Texas. In order to engage in their chosen profession, Texas law requires Appellants to join, associate with, and pay dues to, the Bar. Appellant Mark Pulliam is an inactive member of the State Bar. He does not currently practice law but must pay "inactive" dues to preserve his

ability to return to active status in the future. Each of the Appellants objects to being compelled to associate with, and fund, the State Bar and its political and ideological activities as a condition of practicing their profession. ROA.724-29.

On March 6, 2019, Appellants brought suit against the Bar's officers and directors (Appellees here), alleging that: (1) the First Amendment barred the state from compelling Appellants to join a bar association that engages in political and ideological activities; (2) even if Appellants could be compelled to join the Bar, they could not be compelled to fund its political and ideological activities; and (3) the Bar's procedures for allowing members to opt-out of paying for its political and ideological activities were constitutionally inadequate. ROA.58-74. Shortly thereafter, Appellants filed a motion for preliminary injunction and motion for partial summary judgment on liability. ROA.307-22; ROA.730-50.

From the start of this case, Appellants have argued that they should prevail on all three of their claims under existing Supreme Court precedent, including *Keller*. As Appellants explained in their motion for summary judgment, "Plaintiffs should prevail … even if *Keller* remains

good law, as nothing in *Keller* holds that a state can compel bar membership when the bar engages in political or ideological activities." ROA.742. The Texas Attorney General filed an *amicus* brief in support of Appellants' motion for summary judgment, arguing that, under existing law, "[t]he State Bar of Texas violates the First Amendment rights of its members by compelling financial support for ideological and political activities from its members without their affirmative consent." ROA.1243-44.

Appellees opposed Appellants' motions for preliminary injunction and summary judgment and cross-moved for summary judgment on liability. Appellees did not dispute that many of the Bar's activities could be seen as controversial, political, or ideological. *See* ROA.1279 (acknowledging that "the Bar necessarily engages in some expressive activities"). But Appellees argued that *all* of these activities could nonetheless be financed through coerced dues under *Keller* and *Lathrop v. Donohue*, 367 U.S. 820 (1961). Even if Appellants were forced to fund the Bar's political and ideological activities, Appellees argued that this coercion did not violate the First Amendment because all of the Bar's

activities were "germane" to regulating the legal profession and "improving the quality of legal services." ROA.1281.[1]

B. On May 29, 2020, the district court denied Appellants' motions for preliminary injunction and summary judgment and granted Appellees' cross-motion for summary judgment. As to Appellants' first claim—that they could not be compelled to join and associate with a bar association that engages in political and ideological activities—the district court held that "*Keller* and *Lathrop* directly control under the facts of this case, and therefore bind this court." ROA.3445. The court did not explain how *Keller* could be controlling on this issue when the Supreme Court expressly *declined* to resolve "in the first instance" whether an individual can "be compelled to associate with an

[1] Appellees also filed a motion to dismiss on the ground that the defendants named in the original complaint did not enforce the requirements that Appellants enroll and maintain membership in the State Bar and pay the $65 legal services fee. ROA.1509-14. Appellants opposed the motion to dismiss but filed an amended complaint adding additional defendants to address the issues raised in the motion to dismiss. *See* First Amended Complaint, ROA.2135-52. The district court subsequently dismissed the motion to dismiss without prejudice. *See* ROA.3084. Appellees have not disputed that an injunction against the parties named in the First Amended Complaint could provide full relief to Appellants on all three of their claims if Appellants prevail on their claims.

organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood* [*v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977)]." *Keller*, 496 U.S. at 17.

As to Appellants' second claim—that, at a minimum, they could not be compelled to fund the Bar's many political and ideological activities—the district court found that *every single one* of the challenged activities was "germane" to an amorphous interest in "improving the quality of legal services." ROA.3446-50. For example, even though the Bar lobbies and supports legislation on highly charged issues such as Texas' definition of marriage, the court found that these nakedly political activities "benefit[] the legal profession and improve[] the quality of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial decisions have rendered invalid." ROA.3447.

Finally, the district court summarily rejected Appellants' challenge to the Bar's procedures for objecting to impermissible expenditures. ROA.3450-51. Because the court concluded that all of the challenged activities were "germane" it further held that "Plaintiffs' claim that the

Bar unconstitutionally coerces them into funding allegedly non-chargeable activities without a meaningful opportunity to object necessarily fails as a matter of law." *Id.* at 3451. And the court found that the Bar's opt-out procedures were "adequate" to "protect against compelled speech." *Id.*

C. The district court entered final judgment on May 29, 2020, and Appellants filed a timely notice of appeal on June 2, 2020. Because there is another case currently pending before this Court that implicates similar issues regarding the constitutionality of integrated state bar associations, *see Boudreaux v. Louisiana State Bar Ass'n*, No. 20-30086, Appellants filed a motion to expedite briefing and oral argument to ensure that this appeal can be argued on the same day as *Boudreaux*. This Court granted the motion to expedite on June 11, 2020.

SUMMARY OF ARGUMENT

In *Keller*, the Supreme Court rejected California's argument that integrated bar associations were categorically exempt from First Amendment scrutiny. 496 U.S. at 11-13. But the Court declined to resolve several important questions about the scope of First Amendment protections for attorneys who object to an integrated bar's political and ideological activities. Those open questions are squarely presented here.

I. First, compelling attorneys to join and associate with an integrated bar association that engages in extensive political and ideological activities violates the First Amendment. The Bar puts its imprimatur on numerous controversial issues involving legislation, access to justice programs, race- and gender-based initiatives, ideologically driven programming, and many others. Yet Appellants have no choice but to join and associate with this organization in order to practice their chosen profession. This scheme fails any level of First Amendment scrutiny, most obviously because there are a number of less-restrictive alternatives that could advance the state's interests in regulating and improving the legal profession while imposing a much less severe burden on Appellants' First Amendment rights.

II. At a minimum, the First Amendment prohibits a state from compelling attorneys to *fund* an integrated bar's political and ideological activities that extend beyond regulatory and disciplinary functions. Appellees do not dispute that many of the Bar's activities can be seen as controversial, political, or ideological, or that attorneys of good faith could object to funding these activities. Yet the Bar advances—and the district court accepted—an astonishingly broad interpretation of *Keller* that

would eliminate any meaningful First Amendment limits on an integrated bar's use of coerced dues.

That holding misinterprets *Keller* on its own terms and is also foreclosed by subsequent Supreme Court precedent. The Court has recently clarified that coerced dues must be limited to activities such as "proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. Nothing in *Keller* remotely justifies giving an integrated bar carte blanche to use coerced dues for all manner of controversial and ideologically driven activities merely because they bear (in the Bar's own judgment) some attenuated connection to the law or the legal profession.

III. *Keller* also reserved judgment on the procedures that an integrated bar must use to ensure attorneys are not forced to subsidize political and ideological activities to which they object. 496 U.S. at 17. But subsequent Supreme Court precedent regarding compelled association is clear that an organization that collects government-compelled fees must adopt procedures under which members *opt in* to supporting political and ideological causes, rather than charging everyone the fee by default and expecting objectors to *opt out*.

The Bar does exactly the opposite. It charges all attorneys full membership dues without segregating non-chargeable political and ideological activities. If an attorney objects to paying for the Bar's many political and ideological activities, he is required to pursue a complex and burdensome opt-out process in which the attorney must identify the non-chargeable activities and refunds are given only at the Bar's "discretion." This process flouts recent Supreme Court precedent and fails to ensure adequate protection for the critical First Amendment interests at stake.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, "applying the same standard as the district court." *Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887, 895 (5th Cir. 2013). Courts must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, the material facts are essentially undisputed. Appellants and Appellees disagree about the underlying legal principles and their application to this case, but there was no meaningful dispute over the underlying facts, and the district court's summary judgment order did not identify any disputes of material fact. As Appellants explained below, this case "turns on the Court's resolution

of … legal questions," and thus "one side or the other is entitled to judgment as a matter of law" on liability. ROA.741.[2]

Because there are no disputes of material fact, this Court can reverse the grant of summary judgment to Appellees and grant summary judgment to Appellants on liability. *See Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 539 n.9 (5th Cir. 2004); *Vela v. City of Houston*, 276 F.3d 659, 671 (5th Cir. 2001) (in case with cross-motions for summary judgment and no genuine issues of material fact, this Court can reverse a grant of summary judgment and enter summary judgment for the opposing party); *Owsley v. San Antonio Independent School Dist.*, 187 F.3d 521, 527 (5th Cir. 1999) (reversing and rendering judgment for adverse party on cross-motions for summary judgment); *Ehrlicher v. State Farm Ins. Co.*, 171 F.3d 212 (5th Cir.1999) (same); *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775 (5th Cir.1994) (same).

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[2] Because the appropriate remedy would necessarily turn on the scope of the court's holding on liability, Appellants moved for partial summary judgment only on liability. *See* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense — *or the part of each claim or defense* — on which summary judgment is sought.") (emphasis added); Wright & Miller, Federal Practice & Procedure § 2736 (4th ed.) ("[I]f the court establishes the existence of liability, the case then will proceed for a determination of the damage issue."); *id.* n.5 (collecting cases).

ARGUMENT

I. The District Court Erred by Granting Summary Judgment to the Bar and Denying Appellants' Cross-Motion for Summary Judgment.

A. The First Amendment prohibits compelled membership in a bar association that engages in political and ideological activities.

1. Texas law requires all attorneys to join and associate with the Bar as a condition of practicing their chosen profession even though the Bar engages in extensive political and ideological activities. This scheme is unconstitutional, and Appellants should prevail on this claim even if *Keller* remains good law.

All citizens have the constitutional "freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Compelling individuals to mouth support for views they find objectionable," including by compelled association, "violates that cardinal constitutional command." *Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018). Moreover, "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all,'" and "compelled subsidization of speech seriously impinges on First Amendment rights." *Id.* at 2463-64.

Here, Texas law compels attorneys to join and associate with the Bar even though that organization engages in pervasive political and ideological activities to which many of its members object. The Bar lobbies for the passage of legislation; funds numerous diversity initiatives based on race, gender, and sexual orientation; sponsors ideologically-driven CLEs and panels; compels charitable contributions to pay for legal services, pro bono, and access to justice initiatives; requires members to fund its magazine; and much more. *See supra* at 6-12. Since the First Amendment always protects "[t]he right to eschew association for expressive purposes," there is no question that compelled membership in the Bar *burdens* Appellants' constitutional rights. *Janus*, 138 S. Ct. at 2463.

When considering whether compelled membership in a bar association violates the First Amendment, "generally applicable First Amendment standards" should apply. *Harris*, 573 U.S. at 647. The relevant standard here should be strict scrutiny, which requires narrow tailoring and a compelling government interest. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Strict scrutiny is most consistent with the Supreme Court's broader First Amendment jurisprudence, which

subjects all government action constraining association "to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).[3]

In all events, even if this Court applies "exacting scrutiny," *Harris*, 573 U.S. at 648-51; *Janus*, 138 S. Ct. at 2465, compelled membership in the Bar fails it. The only state interests the Supreme Court has recognized in the context of bar organizations are "regulating the legal profession" and "improving the quality of legal services." *Keller*, 496 U.S. at 13-14. Those interests are limited to activities such as "proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. Furthering those limited interests, however, does not require compelled membership in a bar that engages in extensive political and ideological activities.

[3] The Supreme Court applied a lower standard of scrutiny in *Abood*, 431 U.S. 209, but that standard should not apply here. First, the Court expressly overruled *Abood* in *Janus*, so this Court should not expand it to any new areas. Applying *Abood* to compelled association with an integrated bar that engages in political and ideological activities—a scenario the Supreme Court expressly declined to reach in *Keller*—would be a novel and unwarranted application of *Abood*. Second, even before overruling *Abood*, the Supreme Court had cautioned against applying *Abood*'s standard in "new situation[s]." *Harris*, 573 U.S. at 645-46.

As the party seeking to coerce speech and association, it is the Bar's burden to show that compulsory association "serve[s] a compelling state interest that *cannot be achieved through means significantly less restrictive of associational freedoms*." *Janus*, 138 S. Ct. at 2465 (emphasis added); *Harris*, 573 U.S. at 648-49; *Knox*, 567 U.S. at 310. The Bar "must demonstrate that [these] alternative measures … would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). That is, an integrated bar fails constitutional scrutiny if the government could have adopted alternative measures that are "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465.

Even assuming the Bar's asserted interests are compelling, forcing attorneys to join a bar association that engages in political and ideological activities as a condition of practicing their profession fails any level of tailoring analysis. Texas has at least three alternatives that are "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. *First*, the Bar could stop engaging in political and ideological activities and limit itself to regulatory, disciplinary, and ethical functions. This would significantly reduce the First Amendment harms

inflicted on Appellants. Since the Bar has no right to compel members to support ideological activities in the first place, *see Keller*, 496 U.S. at 14; *infra* Section I.B., this would be a straightforward solution.

Second, the Bar could continue engaging in political and ideological activities as long as attorneys are not compelled to join and associate with it. Nearly twenty states regulate and oversee the legal profession without resorting to compulsory membership in a bar association. *See In re Petition for a Rule Change to Create a Voluntary State Bar*, 841 N.W.2d at 171. Those states include some of the country's largest legal markets, such as New York, Illinois, Massachusetts, Ohio, and Pennsylvania. In those jurisdictions, the government regulates, licenses, and disciplines lawyers directly, without also requiring them to join, fund, and associate with an "integrated" bar association. The Bar has never even suggested—nor could it—that lawyers and the legal profession are not adequately regulated in those jurisdictions.

Voluntary association is necessarily a less-restrictive alternative to coerced association. For example, the Supreme Court has held that the associational harms of coerced union agency fees could not survive tailoring analysis given that unions were capable of effectively

representing their members in 28 states (and at the federal level) even in the absence of mandatory agency fees. *See Janus*, 138 S. Ct. at 2466.

Third, the Bar could be split into two components—a compulsory section that handles regulatory and disciplinary functions and a voluntary foundation supported by non-coerced contributions that engages in all other activities. This would allow the State to capture the supposed regulatory benefits of a mandatory bar, while still allowing those interested in supporting the Bar's ideological activities to do so voluntarily. In light of these significantly less-restrictive alternatives, Texas cannot compel attorneys to join and associate with a bar association that engages in extensive political and ideological activities to which many of its members object.

2. The district court rejected this claim on the ground that "*Keller* and *Lathrop* directly control under the facts of this case, and therefore bind this court." ROA.3445. But the Supreme Court in *Keller* expressly *declined* to resolve "in the first instance" whether an individual can "be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*."

Keller, 496 U.S. at 17; *see also id*. (noting that "[t]he state courts remain[ed] free ... to consider this issue on remand"). The district court made no attempt to explain how *Keller* could "directly control" on an issue that the Supreme Court expressly declined to decide.

In the nineteen years since *Keller*, the Supreme Court has not definitively resolved the question left open in that decision. But that question is now squarely before this Court. For all the reasons set forth above, the First Amendment prohibits a state from compelling individuals to join and associate with a bar association that engages in political and ideological activities to which those individuals object. The "right to eschew association for expressive purposes" is at the core of the First Amendment, *Janus*, 138 S. Ct. at 2463, and there are a number of less-restrictive alternatives that can advance the claimed state interests without burdening Appellants' speech and association rights. The district court erred by granting summary judgment to Appellees on this claim.[4]

[4] Appellants have argued from the start of this case that they can and should win on all three of their claims even if *Keller* remains good law. But *Keller*'s ongoing validity is very much in doubt given that *Keller* relied heavily on *Abood*, which the Supreme Court overruled in *Janus*, 138 S. Ct. at 2478-79. To the extent this Court believes *Keller* forecloses any of Appellants' claims, Appellants reserve the right to challenge *Keller*'s ongoing validity before the Supreme Court.

B. At a minimum, the First Amendment prohibits compelled support for the Bar's activities that extend beyond regulatory and disciplinary functions.

1. "[F]reedom of speech includes both the right to speak freely and the right to refrain from speaking at all," and compelled subsidization of speech "seriously impinges on First Amendment rights." *Janus*, 138 S. Ct. at 2463-64. In the context of mandatory bar associations, the only state interests the Supreme Court has ever recognized are "regulating the legal profession" and "improving the quality of legal services." *Keller*, 496 U.S. at 13-14. In practice, the Supreme Court has explained, this means state bars may use coerced dues only to fund activities "connected with proposing ethical codes and disciplining bar members," not for "political or ideological purposes." *Harris*, 573 U.S. at 655 (emphasis added). Instead of respecting these First Amendment limits, however, the Bar treats Texas attorneys as little more than a piggy bank to fund a wide array of programs, services, initiatives, lobbying, and other activities that extend far beyond regulatory and disciplinary functions.

As explained above, *supra* at 6-12, the Bar uses compelled dues to engage in in extensive political and ideological activities that have no plausible connection to regulatory or disciplinary functions. For example,

the Bar runs a lobbying program that advocates for substantive changes to Texas law. ROA.3752-57, 3862-64. The Bar's legislative agenda ranges from the State's definition of marriage and civil unions to child custody arrangements and trust law. *See* ROA.3755-57, 3959-4019; *supra* at 6-7. The Bar also uses coerced dues to fund the Access to Justice Commission, which lobbies to increase government spending on legal aid and promote "systemic change." ROA.1415-33, 1607, 1619; *supra* at 8-10.

Yet lobbying is the paradigmatic example of what mandatory bar associations *cannot* do with coerced funds. *See Janus*, 138 S. Ct. at 2481 ("reject[ing] ... out of hand" the argument that "costs of lobbying" are chargeable); *Keller*, 496 U.S. at 15-16 (finding it "clear" that "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative"); *Knox*, 567 U.S. at 323 (Sotomayor, J., concurring in the judgment) ("When a public-sector union imposes a special assessment intended to fund solely political lobbying efforts, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds.").

The Bar also uses compelled dues to fund extensive "diversity initiatives" and has an entire "Office of Minority Affairs." ROA.3841-60,

3866-72; *supra* 7-8. It hosts an annual convention featuring sessions, such as "Diversity and Inclusion: The Important Role of Allies" and "Texas Transgender Attorneys: A View from the Bar." ROA.3904-28. It also hosts ideologically slanted CLE sessions like "Intersectionality: The New Legal Imperative" and "The Paradox of Bodily Autonomy: Sex Confirming Surgeries and Circumcision." ROA.3879-82. These are precisely the sort of "sensitive political topics" of "profound value and concern" that the state cannot compel private individuals to subsidize. *Janus*, 138 S. Ct. at 2476.

Moreover, the Bar's Access to Justice Division, Access to Justice Commission, and Texas's $65 Legal Services Fee are effectively compelled charitable contributions, often with a strong ideological bent. *See supra* at 10-11. This "compulsion ... plainly violates the Constitution." *Janus*, 138 S. Ct. at 2464. While pro bono efforts are important, they have nothing to do with the *regulation* of attorneys or legal services. And there is surely no government interest in forcing attorneys to subsidize charitable causes of the State's choosing as a condition of practicing their profession. If the State believes these programs to be important, it can fund them directly from its general fund rather than singling out

attorneys to bear the costs of those programs. *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (government funding of contraceptives was less-restrictive alternative to forcing provision of contraceptives by employers with religious objections).

Finally, the Bar forces attorneys to spend over $1.5 million funding its "official" magazine. ROA.3866-72, 3947; *supra* at 11-12. This is also unconstitutional under *Keller*, as it strays far beyond attorney regulation. *See also United States v. United Foods*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

2. The district court did not dispute that all of these activities could be seen as political, ideological, or controversial, or that many Texas Bar members (including Appellants) object to being forced to fund these activities. The court nonetheless held that *every single one* of the challenged activities could be funded with coerced dues because they were "'germane'" to "'regulating the legal profession and improving the quality of legal services available to the people of the State.'" ROA.3446-50 (quoting *Keller*, 496 U.S. at 13-14). That argument rests on a

misreading of Supreme Court precedent and would eviscerate any meaningful First Amendment limits on the Bar's activities.

Most importantly, nothing in *Keller* grants state bar associations the power to spend coerced dues on political or ideological activities as long as they satisfy an amorphous germaneness test. To the contrary, *Keller* expressly identified "activities of an ideological nature" as an example of *non-germane* activities. As the Court explained:

> The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Keller, 496 U.S. at 14. The best reading of this language is that "activities of an ideological nature" necessarily "fall outside those areas" of permissible activity. *Id.*

But even if *Keller* were open to multiple interpretations on this point, the district court's approach is contrary to more recent Supreme Court precedent regarding coerced association. In *Harris*, decided in 2014, the Court explained that *Keller* "held that members of this bar *could not be required to pay the portion of bar dues used for political or ideological purposes* but that they could be required to pay the portion of

the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655 (emphasis added).

Harris makes clear that, even under *Keller*'s "germaneness" framework, activities of a "political or ideological" nature are non-chargeable to objectors. They are non-germane as a matter of law, full stop. This mirrors the Supreme Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). There, the Court explained that *Keller* had "invalidated the use of the compulsory fees to fund speech on political matters" and held that "Bar or union speech with such content ... was not germane to the regulatory interests that justified compelled membership." *Id.* at 557-58. *Keller* also held that "making those who disagreed with [that speech] pay for it violated the First Amendment." *Id.* at 558. Thus, even if there were some ambiguity about the scope of *Keller*, *Harris* and *Johanns* resolve it decisively in Appellants' favor.

This interpretation is further buttressed by the Supreme Court's recent decision in *Janus*. There, the Court similarly distinguished between speech that is "germane to collective bargaining" and speech that "instead concerns political or ideological issues." *Janus*, 138 S. Ct. at 2473. The Court never suggested that there was a third category of

speech that concerned political or ideological issues but *was* germane to collective bargaining. And the Court further emphasized that even "[u]nder *Abood*"—the principal case upon which *Keller* relied—and other pre-*Janus* precedents, compulsory organizations are "flatly prohibited from permitting nonmembers to be charged" for speech that "concerns political or ideological issues." *Id.*

In the face of the Supreme Court's clear teachings to the contrary, the district court's expansive interpretation of *Keller* gives the Bar a blank check to use coerced dues for even highly controversial political and ideological activities so long as they bear some tangential connection to legal services or the legal profession. This Court should reverse that holding, as the district court's approach would allow the Bar to use coerced dues to fund expenditures far beyond the limited activities approved in *Keller*, *e.g.*, "disciplining bar members" and "proposing ethical codes" for the profession. *See Harris*, 573 U.S. at 655.

3. The district court's brief discussion of the specific activities challenged by Appellants only underscores the complete lack of a limiting principle on the Bar's use of coerced dues. For example, the district court found the Bar's extensive lobbying activities to be "germane" under *Keller*

because "[p]articipating in legislative activities *such as seeking to amend or repeal unconstitutional laws* benefits the legal profession and improves the quality of legal services because it reduces the risk that lawyers, their clients, members of the public, or government officials will rely on laws that judicial decisions have rendered invalid." ROA.3447 (emphasis added).

If the district court were correct that the Bar could use coerced dues to fund lobbying to "amend or repeal" laws the Bar believes to be unconstitutional, then there would be literally no limit on its ability to engage in political advocacy on matters involving abortion, capital punishment, immigration, and countless other hotly charged issues. In each case, the Bar could simply argue that it was lobbying to "amend or repeal" laws that conflict with (its own reading of) Supreme Court precedent. It stretches *Keller* beyond its breaking point to hold—as the district court did—that the Bar's extensive lobbying and legislative program involves nothing more than a neutral, non-ideological effort to regulate lawyers or improve legal services.[5]

[5] The fact that the Bar follows a self-imposed policy against lobbying on (what it believes to be be) issues of "philosophical or emotional division," ROA.3447, cannot insulate its lobbying activities

The district court also noted that "[m]embers of the Bar's voluntary, subject-matter sections coordinate all lobbying activities without compensation from the Bar for their efforts." ROA.3447. But the members of the Bar's board (Appellees here) voted to approve the lobbying efforts on these bills, ROA.3755-57, which gives the proposed legislation the imprimatur of being formally supported by the Bar.

Moreover, the district court's suggestion that the Bar does not *itself* engage in lobbying is incomplete, as the Access to Justice Commission—which the Bar funds though coerced dues—unabashedly engages in legislative activities, including lobbying for more government spending on legal aid. ROA.1487-89 (Commission "advocate[es] for a legislative agenda to ensure successful funding for legal aid organizations and legislative reforms that increase access to justice"); ROA.4342-43 (Executive Director of the Access to Justice Commission thanking an employee for her "phenomenal work on [the Commission's legislative]

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from constitutional scrutiny. That proviso has not prevented the Bar from lobbying on all manner of potentially controversial issues, including the definition of marriage, the use of civil unions, and numerous family-law issues, including the visitation rights of grandparents.

initiatives in the [2019 legislative session]" and discussing other lobbying efforts); *see also* ROA.1606-1619.

The district court further found that all of the Bar's many diversity initiatives could be funded through coerced dues because they seek to "promote a fairness and equity among lawyers" and "build and maintain the public's trust in the legal profession and the judicial process as a whole." ROA.3448. But the very notion of having programs targeted at certain individuals based on their race, gender, or sexual orientation is highly ideological and has been the subject of national controversy for decades. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003). Indeed, people of good faith—including members of the Supreme Court—disagree sharply about the merits of such programs. *Compare Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring) *with id.* at 337 (Sotomayor, J., dissenting). If *Keller* actually authorizes the Bar to use coerced dues to fund such controversial and politically charged programs, then *Keller* is a blank check rather than a meaningful limit on the use of coerced funds.

The district court also held, in two short paragraphs, that all of the Bar's "access to justice" fees and activities were justified on the ground

that they "advance Texas' interest in professional regulation" by assisting lawyers in fulfilling their responsibility to provide public interest legal services. ROA.3447-48. But much of the Bar's "access to justice" spending is designed to advance substantive ideological goals, such as opposing the federal government's immigration policies and lobbying the State to increase funding of legal aid programs. *See* ROA.3886-91, 3942-45. Indeed, the $65 legal services fee—which funds civil legal services for the poor and indigent criminal defendants, *see* Tex. Gov't Code §§ 81.054(c); (j)—is effectively a compelled charitable contribution that is used to fund causes of the State's choosing. This exaction is far afield from the regulatory and disciplinary interests that can potentially justify mandatory bar membership and dues.

* * *

The Supreme Court has recognized that drawing a precise line between permissible and impermissible expenditures often seems "impossible." *Janus*, 138 S. Ct. at 2481. Indeed, that is why the Court overruled *Abood*. By strictly limiting bar expenditures from coerced dues to attorney disciplinary and regulatory functions, this Court can enforce a workable rule that is grounded in Supreme Court precedent. But to the

extent the line is unclear between permissible and impermissible uses of compelled dues, the side that "should bear [the] risk" is the one "whose constitutional rights are not at stake"—the Bar. *Knox*, 567 U.S. at 321. Because the Bar's pervasive use of compelled dues to fund activities unrelated to the regulation of attorneys and legal services is unconstitutional, the Court should reverse the grant of summary judgment to Appellees and enter summary judgment for Appellants on liability.[6]

C. The Bar's opt-out procedures for identifying non-chargeable expenses are inadequate to protect members' First Amendment rights.

1. Finally, independent of the two constitutional flaws addressed above, the Bar's procedures for separating chargeable and non-chargeable expenses are woefully inadequate to protect the important constitutional rights at stake. When identifying chargeable and non-chargeable expenses, the First Amendment requires the Bar to use procedures that are "carefully tailored to minimize impingement on

[6] If Appellants prevail on this claim on liability, it would be straightforward to limit the Bar's use of compelled dues to regulatory and disciplinary functions. Based on its financial statements, the Bar appears to spend approximately $10.5 million on discipline-related efforts. ROA.3866-72.

First Amendment rights." *Knox*, 567 U.S. at 316. Yet the Bar instead uses opt-out procedures that place the burden on objecting members to identify and challenge non-chargeable activities through an opaque and convoluted administrative process. These procedures are constitutionally inadequate to ensure that members are not coerced into funding the Bar's many political and ideological activities.

Opt-Out Policy. The President of the Bar concedes that the Bar "has had an 'opt out' refund procedure for decades." ROA.3950. That type of procedure flouts Supreme Court precedent. In *Knox*, the Court explained that "the difference between opt-out and opt-in schemes is important." *Knox*, 567 U.S. at 312. Opt-out systems "create[] a risk that the fees paid by [those who object to certain activities] will be used to further political and ideological ends with which they do not agree." *Id.* The Supreme Court thus held that opt-out schemes are unconstitutional. Bar organizations, like unions, "may not exact any funds" in the absence of "affirmative consent." *Id.* at 322. In *Janus*, the Court reaffirmed this teaching: "clear[]," "free[]," and "affirmative[]" consent is needed before an association can use an individual's coerced fees or dues to support its political and ideological activities. *Janus*, 138 S. Ct. at 2486.

The Bar's opt-out procedures violate the clear teachings of *Janus* and *Knox*. The Bar requires attorneys to pay their dues in full each year. *See* Tex. Gov't Code § 81.054; ROA.3749, 3957, 4099. Failure to do so means an attorney is suspended from the practice of law. ROA.3749. After paying their dues, attorneys can object to political and ideological expenditures and then seek a refund through a convoluted administrative process. This procedure is flatly contrary to *Janus* and *Knox*, as the Bar neither seeks nor obtains attorneys' clear and affirmative consent before exacting compelled dues for political and ideological purposes. And it certainly is not "carefully tailored to minimize impingement on First Amendment rights." *Knox*, 567 U.S. at 316.

Even if the Bar were permitted to use an opt-out process—and it is not—its procedures would still be inadequate. Organizations that collect compelled dues or fees cannot "adopt procedures that have the effect of requiring objecting nonmembers to lend the [organization] money to be used for political [and] ideological ... purposes." *Knox*, 567 U.S. at 303. If members are required to first pay dues and then seek refunds, "there is at least a risk that, at the end of the year, unconsenting nonmembers will

have paid either too much or too little." *Id.* at 321. Objectors should never have to "bear this risk" because of the "constitutional rights ... at stake." *Id.* Indeed, an organization that receives compelled dues "'cannot be allowed to commit dissenters' funds to improper uses even temporarily.'" *Id.* "By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the [organization] effectively charges the employees for activities that are" unconstitutional. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984).

Yet the Bar has adopted exactly this sort of impermissible refund policy. It charges all attorneys full-freight upfront and says that attorneys may then "object" and "seek a *refund* of a *pro rata* portion of his or her dues *expended*." ROA.3957, 4099 (emphasis added). This makes lending the Bar money for its political and ideological activities the default option. *See Knox*, 567 U.S. at 303, 321.

Moreover, even if an attorney objects to an expense, the Executive Director of the Bar is vested with complete "discretion" to resolve the issue. ROA.3957, 4099. If the Executive Director does not agree, the objector is out of luck. The Bar's opt-out procedures provide for no appeal.

Id. On top of this, if the Executive Director does decide to issue a refund, the Bar claims that the refund is only "for the convenience of the Bar" and cannot "be construed as an admission that the challenged activity was [impermissible]." *Id.* This process provides for no Bar-wide relief and would require each individual attorney who thinks an expenditure is unconstitutional to challenge it separately. The only reason for the Bar to adopt such a policy is to permit it to continue exacting payments, regardless of the constitutionality of its expenditures. This process is not "carefully tailored" to minimize constitutional burdens on the First Amendment. *Knox*, 567 U.S. at 313. Instead, the procedures are flatly unconstitutional because they do "not provide for a reasonably prompt decision by an impartial decisionmaker." *Harris*, 475 U.S. at 307 ("such a requirement is necessary").

Failure to Provide* Hudson *Notice. Finally, compounding the constitutional flaws of its opt-out procedures, the Bar also fails to provide Appellants with a constitutionally sufficient breakdown of its spending. In *Keller*, the Supreme Court explained that mandatory bar associations must provide breakdowns of their chargeable and non-chargeable expenditures so that attorneys can decline to fund political and

ideological activities. *Keller*, 496 U.S. at 17. In particular, the Court indicated that the procedures outlined in *Hudson*, 475 U.S. 292, could form the basis of a constitutionally sufficient disclosure and reserved for the future whether other procedures might also suffice. Here, the Bar's disclosures fall well short of the standard outlined in *Hudson*; its practices instead mirror the *unconstitutional* procedures discussed in *Knox* and *Janus*.

In *Hudson*, the Supreme Court held that "potential objectors [must] be given sufficient information to gauge the propriety of" the portion of dues they are compelled to pay. *Hudson*, 475 U.S. at 306. This means bar organizations must disclose how they calculate the chargeable and non-chargeable portions of their dues. *Id.* at 306-07. The Bar wantonly disregards this requirement. It treats 100% of its expenses as chargeable and does not even attempt to segregate its chargeable and non-chargeable expenditures. This is a black-letter violation of *Keller* and *Hudson*.

2. The district court's reasons for rejecting this claim do not withstand scrutiny. At the outset, the court found that Appellants' challenge to the opt-out procedures and lack of a *Hudson* noticed "fail[]

as a matter of law" because *all* of the challenged activities were "germane," and thus chargeable, under *Keller*. ROA.3451. That argument fails for all the reasons discussed above, as the Bar unquestionably engages in political and ideological activities that cannot constitutionally be billed to objectors.

The district court also noted several times in its opinion that Appellants have not invoked the Bar's procedures to challenge the expenditures at issue here. ROA.3447, 3451. But the Supreme Court has squarely held that there is no exhaustion requirement in the context of §1983 suits. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) ("[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.").

Appellants are thus under no obligation to take part in the Bar's burdensome and unconstitutional opt-out process in order to challenge that process under the First Amendment. Indeed, the district court drew exactly the wrong inference from the fact that "[t]o date no person—Plaintiffs included—have raised an objection under the Bar's protest procedure from the time of its adoption in 2005 until the filing of

Plaintiffs' suit." ROA.3447. Far from supporting the Bar, this fact strongly suggests that the Bar's "daunting" administrative process deters attorneys from seeking relief, *Janus*, 138 S. Ct. at 2482, as it is extraordinarily unlikely that the Bar's 120,000 members unanimously agree that every penny of its expenditures are fully chargeable and can be funded through coerced dues.

Finally, the district court concluded with little analysis that the Bar provided "adequate procedural safeguards" to protect the First Amendment rights of objectors. ROA.3451. But the court did not even attempt to argue that the Bar's procedures would meet the requirements of *Hudson*, such as providing "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.

Nor did the district court address Appellants' argument that cases such as *Janus* and *Knox* require, at a minimum, that the Bar adopt opt-in rather than opt-out policies for its political and ideological activities. The Bar's opt-out policies flout the Supreme Court's holding that

"clear[]," "free[]," and "affirmative[]" consent is needed before an organization can use coerced dues to fund political or ideological activities. *Janus*, 138 S. Ct. at 2486. To the extent this Court concludes that the Bar has engaged in non-chargeable political or ideological activities, the Bar has unquestionably failed to adopt procedures to ensure that objectors are not charged for those activities.

II. This Court Should Reverse and Remand with Instructions to Grant Plaintiffs a Preliminary Injunction Pending Further Proceedings on Remedies.

In light of its decision to grant Appellees' motion for summary judgment, the district court also dismissed Appellants' motion for preliminary injunction. *See* ROA.3451 (n.4). If this Court reverses the decision below and finds that Appellants are entitled to summary judgment on liability, it should remand with instructions to enter a preliminary injunction pending the remedies phase. This Court reviews "'the ultimate decision whether to grant or deny a preliminary injunction … for abuse of discretion,'" but "'a decision grounded in erroneous legal principles is reviewed *de novo*.'" *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). Appellate courts routinely reverse with instructions to enter a preliminary injunction once they find a likely First Amendment violation. *See*, *e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009);

ACLU of Ill. v. Alvarez, 679 F.3d 583, 589-90 (7th Cir 2012); *Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012).

If this Court concludes that Appellants are entitled to judgment on liability on one or more of their First Amendment claims, then the remaining elements of the preliminary-injunction analysis—irreparable harm, balancing of the equities, and the public interest—all favor granting preliminary relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Even "'minimal'" First Amendment violations "'constitute[] irreparable injury,'" and preventing them is "'always in the public interest.'" *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). And the Bar cannot claim to be "harmed" by an injunction that stops it from "violat[ing] ... First Amendment rights"—something it has no right to do. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006).

Moreover, since Appellants filed this case in March 2019, they have now been through two dues cycles in which they have been forced to fund activities to which they object. Bar dues in the 2021 cycle will be due on June 1, 2021, with a grace period extending through August 31, 2021. If this Court rules for Appellants on some or all of their claims, it should instruct the district court on remand to grant preliminary injunctive

relief in advance of the 2021 dues cycle to ensure that Appellants are not required to fund another year of political and ideological activities to which they object.

CONCLUSION

This Court should reverse the district court's decision granting summary judgment to Appellees, grant summary judgment to Appellants on liability, and remand with instructions to grant Appellants a preliminary injunction pending further proceedings on remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

/s/ Jeffrey M. Harris
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Dated: June 30, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 10,041 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

/s/ Jeffrey M. Harris
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Dated: June 30, 2020